IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.6351 OF 2005
TO
CRIMINAL APPLICATION NO.6354 OF 2005
WITH
CRIMINAL APPLICATION NO.6356 OF 2005
TO
CRIMINAL APPLICATION NO.6360 OF 2005
....
WITH
CRIMINAL APPLICATION NO.166 OF 2006
TO
CRIMINAL APPLICATION NO.211 OF 2006

Shri.Siddhivinayak Developers
and 3 Ors. ...Applicants.

Versus

Saral Disha Investments Ltd.,
and Anr. ...Respondents.

Mr.A.H.H.Ponda, Advocate for the Applicants.

Mr.A.R.Shaikh i/b. M/s. A.S.Khan & Asso., Advocate for Respondent No.1.

Mr.Y.M.Nakhwa, APP, for the State.

CORAM : SMT.V.K.TAHILRAMANI,J.

DATED : OCTOBER 19, 2006.

P.C.:

1. Criminal Application Nos.6351 of 2005 to 6354 of 2005 & Criminal Application Nos.6356 of 2005 to 6360 of 2005 are on todays board.

Criminal Application Nos.166 of 2006 to 211 of 2006 are not on board. Taken on board as the parties and issues involved in these criminal applications are same. Hence all these matters are taken up for hearing together and are being disposed of by this common order.

2. Heard Mr.Ponda, the learned counsel for the applicants-original accused, Mr.Shaikh, the learned counsel for respondent No.1-original complainant, and Mr.Nakhwa, the learned APP for the State.

3. The applicants-accused are facing prosecution in Criminal Complaint Nos.232/S/2002, 175/S/2002 to 186/S/2002, 476/S/2002 to 505/S/2002, 507/S/2002, 508/S/2002, 511/S/2002 to 519/S/2002. The complaints in all these cases have been filed by respondent No.1. All these cases are pending before the learned Metropolitan Magistrate, 7th Court at Dadar, Mumbai. All these 54 cases are under Section 138 of the Negotiable Instruments Act. In all the cases the learned Magistrate issued process against the

applicants-accused under Section 138 of the Negotiable Instruments Act.

4. The applicants-accused preferred applications before the learned Magistrate for recall of process. The learned Magistrate, by common order dated 16.12.2002 recalled the process and discharged the applicants-accused in all these cases.

5. Being aggrieved by the common order of the learned Magistrate dated 16.12.2002 recalling the process and discharging the applicants-accused, the respondent No.1-complainant preferred Revision Application No.277 of 2003 before the learned Sessions Judge, Greater Bombay.

6. By order dated 4.12.2004 the learned Sessions Judge allowed the Revision Application and set-aside the common order dated 16.12.2002 passed by the learned Magistrate, and restored the said cases to file. The Sessions Court relying on the decision of the Apex Court in the case of **Adalat Prasad** and **Subramanium Sethuraman** held that

the Magistrate could not recall the order issuing process and hence he set aside the order of the Magistrate.

7. Being aggrieved by the order of the learned Sessions Judge dated 4.12.2004, these Criminal Applications have been preferred in this Court in the said cases. In the present application, it is prayed by the applicants that the order of the learned Sessions Judge dated 4.12.2004 be quashed and set aside and the process issued against the applicants-accused by the learned Magistrate be also quashed and set-aside.

8. Mr.Ponda has raised the contention that no revision application could have been preferred by the complainant before the Sessions Court. He has submitted that as the process was recalled, it amounts to acquittal and hence, the complainant ought to have filed an appeal before the High Court. Thus, it was contended that the revision application preferred before the Sessions Court was not maintainable and the learned Sessions Judge erred in allowing the revision application

preferred by the complainant.

9. Thus, Mr.Ponda submitted that the common order of the learned Magistrate dated 16.12.2002 whereby the process against the applicants-accused came to be recalled, amounts to order of acquittal and as such the revision to the Sessions Court against that order was not maintainable. In support of his contention, he has relied on the decision of a Single Judge of the Delhi High Court in the case of **R.P.G. Transmission Ltd., Vs. Sakura Seimitsu (I) Ltd., & Ors.**, **2005 ALL MR (Cri) JOURNAL 240**, wherein it was held that revision against the order of discharge is not maintainable. I have perused the said decision.

10. As far as the order of the learned Magistrate dated 16.12.2002 whereby the process against the accused persons came to be recalled is concerned, the said order certainly deserves to be set aside in view of the decision of the Supreme Court in the case of **Adalat Prasad Vs. Rooplal Jindal and Ors., 2004(4) Mh.L.J.274** and **Subramanium Sethuraman Vs. State of Maharashtra**

and Anr. 2005(I) Mh. L.J. 626, wherein it is clearly held that the Magistrate has no power to recall the order issuing process. In view of this, the order of the learned Magistrate dated 16.12.2002 is clearly erroneous and deserves to be set-aside.

11. As regards the contention of Mr.Ponda that the Sessions Court did not have the power to set aside the order of the Magistrate recalling process, useful reference could be made to the decision of this Court in the case of **Mahendra Indermal Borana Vs. Anil Shankar Joshi & Anr, 2004 ALL MR(Cri) 1715**. In the said case the learned Magistrate dismissed the complaint. Being aggrieved by the dismissal of the complaint, the complainant preferred revision application before the Sessions Court. The Sessions Court allowed the revision application and restored the complaint to the file of the learned Magistrate. Being aggrieved by the order of the Sessions Court restoring the complaint the accused Mahendra Borana preferred Criminal Application to the High Court praying that the order of the Sessions Court

be set aside. This Court relying on the decision of the Apex Court in the case of **Major General A.S.Gauraya and Anr. Vs. S.N.Thakur and Anr., 1986 CRI.L.J.1074**, held that the complaint had been rightly restored by the learned Sessions Judge.

. In the case of Major General A.S. Gauraya (supra) the learned Magistrate by his order dated 16.7.1977 dropped the proceedings against the accused. Being aggrieved thereby, the complainants filed a revision before the Sessions Judge. The Sessions Judge reversed the decision of the learned Magistrate. Being aggrieved thereby the accused persons approached the High Court. The said revision application came to be dismissed and against that order appeal came to be filed before the Supreme Court. The question which arose before the Supreme Court is whether the Magistrate can exercise such a jurisdiction. The Supreme Court observed that this issue is concluded and the Magistrate absolutely had no jurisdiction to recall the order dismissing the complaint. Immediately, thereafter the Supreme

Court has observed that remedy of the respondent in such cases was to move the Sessions Court or the High Court in revision. It is pertinent to note that in the case of **Major General A.S. Gauraya** (supra) the Apex Court in paragraph-11 has observed as under :

> "In these circumstances, therefore, the learned Magistrate had, absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision."
> (Emphasis supplied).

12. Thus, from the above observation, it is clear that in the present case the revision preferred by the respondent No.1-complainant against the order of the Magistrate recalling process was very much maintainable. Thus, the learned Sessions Judge was right in entertaining the revision application preferred by the complainant against the order of the Magistrate recalling process.

13. On perusal of the judgment in the case of **R.P.G.Transmission Ltd.** (supra), it is seen that no decision of the Supreme Court was considered on the point in issue, nor was any other decision on the said issue considered by the Court; whereas in the decision of this Court in the case of **Mahendra Borana** (supra), reliance has been placed on a decision of the Supreme Court in the case of **Major General A.S.Gauraya**. Hence, I am inclined to follow the decision of this Court in the case of **Mahendra Borana**. In view of the decision of this Court in the case of **Mahendra Borana** it is clear that the Sessions Court has rightly entertained the revision application preferred by the complainant. Hence, the order of the learned Sessions Judge entertaining the said revision does not require any interference.

14. Thereafter Mr.Ponda has submitted that necessary averments required in a case under 138 of the Negotiable Instruments Act are missing in all the complaints. Mr.Ponda submitted that in view of this fact, the process issued against the

applicants deserves to be quashed.

15. As far as the prayer for quashing of process is concerned, in my opinion, in view of the decision of this Court in the case of **V.K.Jain and others Vs. Pratap V. Padode, reported in 2005(3) Mh.L.J.778,** the applicants have an efficacious remedy of preferring revisions against the order of Magistrate issuing process. Hence, in my view, it would be appropriate that the applicants prefer revisions before the concerned Sessions Court against the order of the Magistrate issuing process.

16. Liberty is granted to the applicants-accused to prefer the necessary revision before the concerned Sessions Court. Mr.Ponda, the learned advocate for the applicants makes a statement that the necessary revision will be preferred within a period of six weeks from today.

17. Mr.Shaikh, the learned advocate for respondent No.1-complainant, on instructions,

fairly states that no objection will be raised in respect of limitation in filing the revision if the revisions are filed within a period of six weeks from today.

18. To enable the applicants-accused to prefer necessary revision ad-interim relief granted by this Court stands extended for a period of six weeks from today.

19. On the necessary revision being preferred by the applicants-accused before the concerned Sessions Court, the concerned Sessions Court shall dispose of the matter on merits after hearing the necessary parties. All contentions of both sides on merits are kept open.

20. Criminal applications are disposed of.

(SMT.V.K.TAHILRAMANI,J.)